UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBINSON MANUFACTURING COMPANY, et al.,	***)***	
Plaintiffs	***)***	
v.	***)***	***Civil No. 02-42-P-H***
BANC OF AMERICA COMMERCIAL, LLC,	***)***	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND IMPROPER VENUE

Defendant Banc of America Commercial, LLC ("Bank") moves to dismiss the instant breach-of-contract and tort action for lack of personal jurisdiction and improper venue. Banc of America's Motion To Dismiss for Lack of Personal Jurisdiction and Improper Venue ("Motion") (Docket No. 3) at 1-2; Complaint and Demand for Jury Trial ("Complaint") (Docket No. 1) ¶¶ 26-63. For the reasons that follow, I recommend that the Motion be denied.

I. Applicable Legal Standards

A motion to dismiss for lack of personal jurisdiction raises the question whether a defendant has "purposefully established minimum contacts in the forum State." *Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992) (citation and internal quotation marks omitted). The plaintiff bears the burden of establishing jurisdiction; however, where (as here) the court rules on a Rule 12(b)(2) motion without holding an evidentiary hearing, a *prima facie* showing suffices.

Archibald v. Archibald, 826 F. Supp. 26, 28 (D. Me. 1993). Such a showing requires more than mere reference to unsupported allegations in the plaintiff's pleadings. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). However, for purposes of considering a Rule 12(b)(2) motion the court will accept properly supported proffers of evidence as true. *Id.*

The filing of a Rule 12(b)(3) motion likewise places the burden on the plaintiff to demonstrate the propriety of venue. 5A Charles Alan Wright & Arthur M. Miller, *Federal Practice and Procedure* § 1352 at 264-65 (2d ed. 1990). As in the case of a Rule 12(b)(2) motion, the court accepts a plaintiff's properly supported proffers of evidence as true. *M.K.C. Equip. Co. v. M.A.I.L. Code, Inc.*, 843 F. Supp. 679, 682-83 (D. Kan. 1994).

II. Factual Background

The following facts, with conflicts resolved in favor of the plaintiffs' properly supported proffers of evidence, bear on the pending motion.

Plaintiff Robinson Manufacturing Company ("Company") manufactures wool and wool-based fabrics for customers in the United States and elsewhere. Affidavit of Joseph Robinson, II ("Robinson Aff."), attached as Exh. 3 to Plaintiffs' Opposition to Defendant's Motion To Dismiss, etc. ("Opposition") (Docket No. 5), ¶ 2. The Company's operations, including its mill and administrative offices, are located in Oxford, Maine. *Id.*

The Bank is a Georgia limited liability company with a principal place of business in Atlanta, Georgia. Affidavit of L. Ransom Burts ("First Burts Aff.") (Docket No. 4) ¶ 3. Prior to April 2001, when it was converted from a corporation to a limited liability company and changed its name, the Bank operated under the name Banc of America Commercial Corporation (also, "Bank") and was a Georgia corporation with a principal office in Atlanta, Georgia. *Id.* Prior to August 1999, Banc of

America Commercial Corporation was named NationsBanc Commercial Corporation (also, "Bank"). *Id*.

The terms of the Company's contracts with customers often provide an extended period for payment. Robinson Aff. ¶ 3. For that reason, it has established factoring relationships with banks under which it assigns accounts receivable to a bank and, for a fee or commission, the bank assumes the associated credit risk, collects the funds from the customer and remits them to the Company less the fee or commission. *Id*. Prior to December 1992 the Company had a factoring relationship with Bank of Boston with which it was not satisfied. *Id*. ¶ 4. In 1992 a third party told Harvey Gross, then the Bank's vice-president for wholesale credit, that the Company and co-plaintiff L.W. Packard & Company, Inc. ("Packard") were unhappy with their current factor, whereupon Gross contacted Peter Warshaw of Warshaw Woolen Associates ("Agency"), the Company's selling agent in New York. Affidavit of Harvey Gross ("Gross Aff."), attached as Exh. 2 to Opposition, ¶¶ 3-5.[1]

Discussions were initiated between the Bank and the Agency about the possibility of establishing a factoring relationship between the Company and the Bank. Robinson Aff. ¶ 4. Discussions and negotiations over the potential relationship took place over several months, leading to execution of a factoring agreement in December 1992 ("1992 Agreement"). *Id*. Gross personally had numerous conversations with Warshaw and also called employees at the Company's mill in an effort to establish a factoring relationship. Gross Aff. ¶ 6. In addition, prior to October 30, 1992 Gross contacted Joseph Robinson II, then the Company's vice-president and treasurer, to arrange a meeting at the Company's offices in Oxford to discuss the proposed factoring arrangement. Robinson Aff. ¶¶ 4-5. On October 30, 1992 Gross and James Cappock from the Bank's offices in New York City traveled to

[1] Packard's dealings with the Bank are not here in issue inasmuch as Packard is a New Hampshire corporation with its principal place (*continued on next page*)

Maine to meet with Robinson in Oxford. *Id*. ¶ 5. They discussed generally how the Bank handled factoring arrangements and the services it would provide to the Company. *Id*. Robinson explained the Company's business, how it took orders from customers and produced and shipped product to fill them and related matters. *Id*. From Robinson's perspective, the meeting was an important part of the process that led to execution of the 1992 Agreement. *Id*.

During the fall of 1992 Robinson asked the Company's lawyer, Richard Hackett of Pierce Atwood in Portland, Maine, to work with Bank representatives and Warshaw to negotiate the terms of the 1992 Agreement and related documents. *Id*. ¶ 6. The Bank initiated numerous telephone conferences with the Company's counsel in Maine, sent numerous faxes and letters to them and sent correspondence addressed to Robinson in Oxford. Gross Aff. ¶ 9.[2] Robinson reviewed in Maine drafts of documents resulting from these negotiations. Robinson Aff. ¶ 6. The 1992 Agreement and related documents were finalized and sent to Robinson for execution in Maine. *Id*. ¶ 7.[3] Robinson also received letters from the Bank dated November 30, December 1 and December 8, 1992 relating to the 1992 Agreement and addressed to the Company in Maine. *Id*.

The parties to the 1992 Agreement were the Bank and the Company. *Id*. ¶ 8. The Agency was not identified as a party and specifically disclaimed any interest in the receivables subject to the 1992

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of business in Ashland, New Hampshire. *See* Complaint ¶ 2.

[2] According to Hackett's records, from October through December 1992 he participated in at least seven telephone calls with Bank representatives to discuss the terms of the 1992 Agreement and related documents, mostly from his Portland office. Affidavit of Richard P. Hackett, attached as Exh. 4 to Opposition, ¶ 5. He received at least six faxes at his office from Bank representatives. *Id*. ¶ 6.

[3] Robinson appends to his affidavit a copy of the 1992 Agreement at the time he signed it in Maine in December 1992. Robinson Aff. ¶ 7; Factoring Agreement Entered Into Between Robinson Manufacturing Company and NationsBanc Commercial Corporation ("Finalized 1992 Agreement"), attached as Exh. A to *id*. This copy is executed only by the Company; spaces provided for signature of a Bank representative and, in the case of an incorporated rider, an Agency representative, are blank. *See* Finalized 1992 Agreement. This is consistent with the Bank's representation that, after being signed by the Company and the Agency, the 1992 Agreement was accepted by the Bank in Georgia. First Burts Aff. ¶ 6.

Agreement except as selling agent. *Id*.[4] The 1992 Agreement was governed by and to be construed and enforced in accordance with the laws of the state of New York. First Burts Aff. ¶ 6. Pursuant to the terms of the 1992 Agreement, the Bank was granted a power of attorney to act as the Company's attorney-in-fact with respect to the receivables assigned and sold thereunder. *Id*. ¶ 7.

Shortly after December 3, 1992 Robinson received a letter from Cappock of the Bank requesting that the Company sign an enclosed UCC-1 financing statement under which the Bank claimed a security interest in contract rights and other general intangibles of the Company in connection with the 1992 Agreement. Robinson Aff. ¶ 9.[5] Robinson executed and returned the financing statement to the Bank. *Id*. A UCC-1 statement executed by the Company in favor of the Bank was recorded at the State of Maine Department of the Secretary of State on December 28, 1992. Affidavit of Janet R. McInnis, attached as Exh. 6 to Opposition, & attachments thereto.

The Company maintained a factoring relationship with the Bank pursuant to the 1992 Agreement from December 1992 to December 2000. Robinson Aff. ¶ 11. During that period, Bank representatives visited the Company's facilities in Oxford in connection with the 1992 Agreement a number of times. *Id*. For example, Gross and Carl Banilow of the Bank came to the mill on October 19, 1993 for the first of annual meetings with Bank representatives at the Company's Oxford mill. *Id.* ¶ 12. They discussed the factoring relationship, the status of the Company's business and other related matters. *Id*. On October 10, 1994 Stewart Long, Stuart Brister and Gross requested a meeting at the Company's offices in Oxford and traveled to Maine to meet with Robinson. *Id*. ¶ 13. They discussed

[4] A space was provided for execution of a rider to the 1992 Agreement by the Agency, identified as exclusive sales agent for the Company, authorized to act on its behalf with respect to any provisions of the 1992 Agreement. *See* Rider to Factoring Agreement, attached to Finalized 1992 Agreement.

[5] Although Robinson refers to "John" Cappock, Robinson Aff. ¶ 9, the letter in question is signed by "James F." Cappock, *see* Exh. C to *id*., presumably the same James Cappock who had visited the mill with Gross.

how the factoring arrangement was working and expressed interest in expanding the relationship to include the option of the Company's receiving advance payments against the receivables assigned to the Bank under the 1992 Agreement. *Id*. Robinson also gave the three Bank representatives a tour of the mill. *Id*.; Gross Aff. ¶ 13. Gross, usually accompanied by another Bank representative, came to the Oxford mill in most years between 1994 and 2000, typically in the fall, to discuss the factoring relationship. Robinson Aff. ¶ 14.[6]

In addition to these trips to Maine, the Bank sent auditors to Oxford approximately annually to review the Company's books and accounts, meet with Company employees, verify sales and orders, check mill inventories and obtain and verify other information important to the Bank's assessment of the Company's ability to perform under the 1992 Agreement. Gross Aff. ¶ 14. The auditors' visit to the mill typically would last at least two days. *Id*. Throughout Gross's tenure with the Bank (through January 2000) there were numerous calls, faxes and letters from the Bank to Company employees in Oxford and its attorneys in Portland relating to the factoring relationship. *Id*. ¶¶ 3, 15. For example, Roberta Polland, who has worked as an accountant for the Company since April 1, 1996, communicated with Bank employees on a regular basis and received numerous faxes at the Company's Oxford offices relating to the 1992 Agreement, including bimonthly account aging reports (noting amounts owed by each customer) and confirmations that the Bank had wired money to a bank account maintained by the Company at State Street Bank and Trust Company in Boston. Affidavit of

[6] L. Ransom Burts, who was employed as a Bank risk manager from approximately January 1992 to December 2000, states that (i) for the first four to five years after the 1992 Agreement was signed, Bank employees believed that the principal with whom they were dealing was the Agency, which was their primary contact; (ii) Warshaw, president of the Agency, visited the Bank in Atlanta on one or more occasions in connection with the factoring relationship; and (iii) Bank employees believed attorney Hackett represented the Agency, not the Company. Supplemental Affidavit of L. Ransom Burts ("Second Burts Aff."), attached to Banc of America's Reply to Plaintiffs' Opposition to Motion To Dismiss ("Reply") (Docket No. 6), ¶ 3. The alleged Bank employee beliefs are irrelevant and, in any event, conflict with evidence adduced by the Company, whose version I accept as true. The fact that Warshaw visited Georgia is of marginal significance.

Roberta Polland ("Polland Aff."), attached as Exh. 5 to Opposition, ¶¶ 3-6, 10. The Bank also mailed monthly statements summarizing account activity directly to the Company's Oxford offices. *Id*. ¶ 8. Polland's predecessors at the Company also received these faxes and mailings from the Bank. *Id*. ¶¶ 7, 9, 11.[7]

Pursuant to the 1992 Agreement, from 1993 to 2000 the Company assigned accounts receivable to the Bank totaling between approximately $15 million and more than $35 million per year. Robinson Aff ¶ 17. All of the goods resulting in the assigned accounts receivable were manufactured at the Company's mill in Oxford. *Id*. To the best of Burts' knowledge, invoices were rendered by the Agency in New York City, as the Company's agent. First Burts Aff. ¶ 7.

The Bank has not registered to do business in Maine, has no employees, payroll, offices, mailing address, telephone or bank accounts here and owns no real estate here. *Id*. ¶ 4.[8]

The Company and Packard filed the instant action on February 26, 2002, asserting, *inter alia*:

> 11. From December 1992 through December 2000, the Mills [*i.e*., Packard and the Company] offered their customers a 1% prompt payment discount, if the customer made payment of an invoice in full within ten days (the "1%/ten discount").
>
> 12. [T]he Mills' customers rarely paid invoices within ten days, and thus rarely qualified for the 1%/ten discount . . . .
>
> 13. Prior to September of 1995, pursuant to the Factoring Agreements, Defendant Banc of America remitted to the Mills the gross amount of the payments it received from the Mills' customers on factored accounts, less [a] .95% commission.

[7] A monthly status of accounts also was sent by the Bank to the Agency in New York City. First Burts Aff. ¶ 7. Burts states that the Bank's practice was to send client monthly statements only to the entity listed as the addressee – in this case the Agency – and that the Bank would not have forwarded such statements directly to the Company absent a request for such special handling by the Agency. Second Burts Aff. ¶ 4. For purposes of the instant Motion, I accept as true Polland's assertion that the Bank mailed monthly statements directly to the Company at its Oxford offices. *See* Polland Aff. ¶¶ 8-9.

[8] Burts also states that the Bank has not engaged in business in Maine and owns no assets here. First Burts Aff. ¶ 4. To the extent that the Company adduces arguably conflicting evidence (*e.g*., that the Bank has engaged in business in Maine with the Company and holds a security interest in Company assets reflected in a Maine UCC-1 filing), I construe the evidence in the light most favorable to the Company.

> Banc of America did not make deductions from those payments with respect to the 1%/ten discount, as it was not available to customers who did not pay within ten days.
>
> 14. Prior to September of 1995, Warshaw, as the Mills' sales agent, discussed with Defendant Banc of America, the possibility of the bank's receiving a portion of the interest charged to the Mills' customers on late payments, as an incentive for Banc of America to collect the interest. Pursuant to those discussions, the Mills, through Warshaw, and Banc of America agreed that Banc of America could retain 25% of the late payment interest which it collected on factored accounts which were overdue, and that beginning in March 1997, Banc of America could retain 50% of such late payment interest.
>
> 15. In implementing the agreement concerning retention of a portion of interest collected, Defendant Banc of America improperly, and without knowledge of the Mills, programmed its computers such that it also retained an equivalent percentage of the 1%/ten discount even though the Mills' customers rarely qualified for the discount. This error resulted in Banc of America's improperly retaining .25% of gross receipts from the Mill's [sic] customers until March, 1997, when it began improperly retaining .50% of the gross receipts.

Complaint ¶¶ 11-15. The Company and Packard seek return of the allegedly wrongfully withheld gross receipts related to the 1%/ten discount on theories of breach of contract (Counts I-II), money had and received (Counts III-IV), unjust enrichment (Counts V-VI) and conversion (Counts VII-VIII). *Id*. ¶¶ 26-63.

Burts believes that Warshaw would be able to provide specific information regarding the negotiations described in paragraph 14 of the Complaint leading to the September 1995 agreement ("1995 Modification"), including its precise terms, the persons with whom he negotiated, how agreement was reached, how the terms of the agreement were memorialized (if they were), by and to whom the accounting and reconciliation of amounts due under that agreement were reported, and the connection between the Bank and Maine with respect to these facts. Second Burts Aff. ¶ 6.

III. Discussion

A. Personal Jurisdiction

In diversity cases such as this the exercise of personal jurisdiction over a non-resident defendant is governed by the forum state's long-arm jurisdiction statute. *American Express Int'l, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1178 (1st Cir. 1989). Maine's long-arm jurisdiction statute declares that it is to be applied "so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States Constitution, 14th amendment." 14 M.R.S.A. § 704-A(1). Therefore, on a motion to dismiss for lack of personal jurisdiction, this court's inquiry focuses on whether the assertion of jurisdiction violates due process. *See, e.g., Archibald*, 826 F. Supp. at 29.

A court may have general or specific personal jurisdiction over the defendants in an action. General jurisdiction arises when the defendant has engaged in substantial or systematic and continuous activity, unrelated to the subject matter of the action, in the forum state. *Scott v. Jones*, 984 F. Supp. 37, 43 (D. Me. 1997). Specific jurisdiction is based on a relationship between the forum and the particular acts or injuries that provide the basis for the action, that is, "where the cause of action arises directly out of, or relates to, the defendant's forum-based contacts." *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088-89 (1st Cir. 1992). The Maine long-arm statute provides only for the exercise of specific jurisdiction, *Lorelei Corp. v. County of Guadalupe*, 940 F.2d 717, 720 (1st Cir. 1991), and the Company presses no claim that general jurisdiction exists, *see* Opposition at 7-8.

The First Circuit has developed the following test to evaluate the appropriateness of the exercise of specific jurisdiction:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the

> defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

163 Pleasant St., 960 F.2d at 1089. The "Gestalt factors" comprise

> (1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

Id. at 1088. Once the plaintiff makes a *prima facie* showing of relatedness and minimum contacts/purposeful availment, the burden shifts to the defendant to convince the court that the Gestalt factors militate against the exercise of jurisdiction. *Coolidge v. Judith Gap Lumber Co.*, 808 F. Supp. 889, 891 (D.Me.1992); *see also Foster-Miller, Inc. v. Babcock & Wilcox Canada,* 46 F.3d 138, 145 (1st Cir. 1995) (plaintiff "must carry the devoir of persuasion on the elements of relatedness and minimum contacts") (citations omitted).

In this case, the plaintiffs each assert four causes of action (for breach of contract, money had and received, unjust enrichment and conversion). For purposes of relatedness in particular, analysis is claim-specific. *See, e.g., Phillips Exeter Acad. v. Howard Phillips Fund, Inc*., 196 F.3d 284, 288-89 (1st Cir. 1999). However, in this case I need consider only the breach-of-contract claim inasmuch as (i) I find that personal jurisdiction exists over the Bank with respect to that claim, and (ii) the remaining claims all arise out of the same nucleus of operative facts, as a result of which they may be reached pursuant to the court's pendent jurisdiction. *See, e.g., Borumand v. Assar*, 192 F. Supp.2d 45, 52 (W.D.N.Y. 2001) ("[R]egardless of whether or not the alleged conversion and breach of fiduciary duty occurred in New York State, the Court nonetheless has jurisdiction over those claims as well, since they arise from the same nucleus of operative facts as the fraud claim."); *Andrews v. Emerald Green Pension Fund*, Civil No. 98-436-P-H, 2000 WL 1473376, at *7 (D. Me. Sept. 27, 2000)

("Under the doctrine of pendent jurisdiction, there is jurisdiction over Cassidy and Shawver as to the related state law claims, even if personal jurisdiction would not be otherwise available. The claims here derive from a common nucleus of operative fact; all stem from the defendants' scheme to induce the plaintiffs to invest in the Fund through a series of false or misleading statements and material omissions.") (citations and internal quotation marks omitted).

1. Relatedness

In analyzing "relatedness" with respect to contract causes of action, "the Court considers any nexus – between the forum state and the formation, performance or breach of the contract – that would give the forum state a legitimate interest in litigation arising out of the alleged breach of contract." *Telford Aviation, Inc. v. Raycom Nat'l, Inc.*, 122 F. Supp.2d 44, 46 (D. Me. 2000). In this case, much hinges on the question of the contract with respect to which relatedness is to be gauged. In the Bank's view, it is the 1995 Modification; in the Company's view, it is the 1992 Agreement. *See* Motion at 10; Reply at 1, 6-7; Sur Reply Memorandum ("Surreply") (Docket No. 8) at 1-2. The Company has the better of the argument.

Pursuant to the 1995 Modification, the parties agreed that the Bank could begin withholding a portion of the interest collected on the Company's customers' late payments as an incentive to undertake collection activities. In implementing that modification, the Bank programmed its computers to withhold not only a portion of the late-payment interest but also an equivalent percentage of the 1%/ten discount, for which the Company's customers rarely qualified. Inasmuch as appears, there is no dispute between the parties concerning the subject matter of the 1995 Modification – retention of late-payment interest. Rather, their conflict concerns the Bank's alleged wrongful retention of gross receipts tied to the 1%/ten discount. As the Company points out, retention of receipts related to discounts is addressed in sections 1.6 and 2.5 of the 1992 Agreement. *See* Opposition at 6-7; Surreply

at 1-2; 1992 Agreement, attached as Exh. A to First Burts Aff., §§ 1.6, 2.5. Thus, although the 1995 Modification is tangentially related to the Company's claim, the cause of action is for breach of the 1992 Agreement.

There can be no serious question that the Bank dealt extensively with this forum in connection with the formation and performance of the 1992 Agreement. Notwithstanding the fact that Bank employee Gross initially solicited the Company's business via the Agency in New York, he and other Bank representatives made repeated contacts with Robinson, the Company and its counsel in Maine that were essential to formation of the 1992 Agreement. These included not only numerous faxes, telephone calls and mailings but also the pivotal October 30, 1992 face-to-face meeting at the Company's offices in Oxford, Maine.

Likewise, the Bank had substantial contact with this forum related to performance of the 1992 Agreement throughout the parties' eight-year course of dealing, including Gross's and the Bank auditing team's approximately annual site visits to Oxford, the filing of a UCC-1 statement with the Maine Secretary of State evidencing the Bank's security interest in Company property and repeated faxes and mailings to the Company's Oxford offices concerning the substance and status of the 1992 Agreements (including payments that the Company now claims were wrongly calculated).

For all of these reasons, the contract-based cause of action readily passes the "relatedness" test.

2. Purposeful Availment

This court has observed that "[a]lthough mere awareness that one's product (or financial payment) will end up in the forum state is not enough to foresee being subject to jurisdiction there, nevertheless, targeting and initiating an ongoing business relationship with a Maine company evinces an intent to avail oneself of the benefits of the forum state, including participation in the market and

access to its courts." *Forum Fin. Group v. President & Fellows of Harvard Coll.*, 173 F. Supp.2d 72, 90 (D. Me. 2001).

Although the Bank initially targeted the Company via its sales agent in New York City, it soon trained its sights as well on the Company in Maine, engaging in a lengthy and deliberate string of negotiations that included the face-to-face meeting in Oxford on October 30, 1992. These negotiations were intended to, and did, culminate in the establishment of an ongoing relationship with a Maine company. Although significant aspects of the factoring relationship were indeed carried on out-of-state (including invoicing of clients and collection activity), the connection to Maine nonetheless was purposeful and substantial. The woolen goods that underlay the relationship were manufactured entirely in Maine. The Bank held a security interest in Company assets, kept in frequent communication with the Company over the course of their eight-year relationship and even sent representatives and auditors approximately annually to the Company's mill and offices in Maine.[9] As the Company aptly summarizes the course of the parties' dealing, "[t]hese contacts were not random, isolated, involuntary or fortuitous." Opposition at 14.

3. Reasonableness

"The purpose of the gestalt factors is to aid the court in achieving substantial justice, particularly where the minimum contacts question is very close. In such cases, the gestalt factors may tip the constitutional balance." *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 717 (1st Cir. 1996). The

[9] A line of cases on which the Bank partly relies, in which courts found no personal jurisdiction over banks whose only (or virtually only) contact with the forum was the issuance of a letter of credit in favor of a plaintiff with forum connections, is readily distinguishable. *See* Motion at 9; *Pacific Reliant Indus., Inc. v. Amerika Samoa Bank*, 901 F.2d 735, 737-38 (9th Cir. 1990); *Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1151-52 (6th Cir. 1990); *Leney v. Plum Grove Bank*, 670 F.2d 878, 880-81 (10th Cir. 1982); *H. Ray Baker, Inc. v. Associated Banking Corp.*, 592 F.2d 550, 553 (9th Cir. 1979); *Empire Abrasive Equip. Corp. v. H.H. Watson, Inc.*, 567 F.2d 554, 558 (3d Cir. 1977); *Occidental Fire & Cas. Co. of N.C. v. Continental Ill. Nat'l Bank & Trust Co. of Chi.*, 689 F. Supp. 564, 568 (E.D.N.C. 1988). Here, the Bank had extensive forum dealings with the Company respecting the contract in issue, the 1992 Agreement.

minimum contacts question in this case is not close. Moreover, the Bank presents little evidence or argument that the Gestalt factors, which I address *seriatim*, weigh in its favor:

1. Burden of appearance: "[T]he concept of burden is inherently relative, and, insofar as staging a defense in a foreign jurisdiction is almost always inconvenient and/or costly . . . this factor is only meaningful where a party can demonstrate some kind of special or unusual burden." *Pritzker v. Yari*, 42 F.3d 53, 64 (1st Cir. 1994); *see also, e.g., Smirz v. Fred C. Gloeckner & Co.*, 732 F. Supp. 1205, 1208 (D. Me. 1990) (defendant who purposefully directs activities toward Maine shoulders burden of providing compelling evidence why exercise of jurisdiction would be unreasonable). The Bank neither argues nor provides evidence that appearance in Maine would impose a special or unusual burden on it.

2. Interest of the forum: As to this factor, the court's "task is not to compare the interest of the two sovereigns . . . but to determine whether the forum state *has* an interest." *Nowak*, 94 F.3d at 718 (emphasis in original). The Bank argues that "Maine has no interest in adjudicating a dispute based on contracts governed by New York law." Motion at 12. However, Maine does have an interest in providing "a convenient forum for its residents to redress injuries inflicted by out-of-forum actors." *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, No. 01-2595, slip op. at 43 (1st Cir. May 10, 2002) (citation and internal quotation marks omitted).

3. Plaintiff's convenience: Maine transparently is the more convenient forum for the Company. A court "must accord deference to [a plaintiff's] choice of . . . forum." *Nowak*, 94 F.3d at 718.

4. Administration of justice: "This factor focuses on the judicial system's interest in obtaining the most effective resolution of the controversy." *Id*. "Usually this factor is a wash," *id.*, and the Bank provides no reason to find otherwise in this case. The Bank argues that this dispute

would be resolved more effectively through an action brought in New York, where the plaintiffs' key witnesses are located. Motion at 12. However, the Bank does not identify these witnesses or explain why they are "key." Moreover, inasmuch as appears, in this action there are witnesses from Georgia, New York, New Hampshire and Maine. Accordingly, some witnesses will have to travel regardless of where the action is brought. In this sense, the location is a "wash."

5. Pertinent policy arguments: This "factor addresses the interests of the affected governments in substantive social policies." *Nowak*, 94 F.3d at 719. The Bank makes no argument pertinent to this factor apart from pointing out that the 1992 Agreement must be construed in accordance with the laws of New York. *See* Motion at 12. However, this in itself is not a weighty concern. *See, e.g.*, *Nowak*, 94 F.3d at 720-21 (ascribing "little weight," as matter of public interest in *forum non conveniens* analysis, to fact that choice-of-law rules obliged Massachusetts court to apply Hong Kong law; noting that "the task of deciding foreign law [is] a chore federal courts must often perform.") (citations and internal quotation marks omitted).

In this case, consideration of the Gestalt factors as a whole does not counsel against this court's exercise of personal jurisdiction over the Bank. Particularly in view of the Company's strong showing on the relatedness and purposeful-availment fronts, the Gestalt factors do not tip the constitutional balance in the Bank's favor.

B. Propriety of Venue

In a diversity case such as this, venue is proper, *inter alia*, in "a judicial district where any defendant resides, if all defendants reside in the same State" and in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred[.]" 28 U.S.C. § 1391(a). The Company argues that venue is proper here on both bases, noting that for venue purposes a corporation is deemed to "reside" in any judicial district in which it is subject to personal jurisdiction

at the time the action is commenced. Opposition at 19-20; *see also* 28 U.S.C. § 1391(c). Inasmuch as the Bank is subject to personal jurisdiction in Maine, it is deemed to "reside" here for purposes of section 1391(a). Venue accordingly is proper.

In any event, as the Company argues, "a substantial part of the events or omissions" giving rise to the instant claims occurred in Maine. *See* Opposition at 20. The "substantial part" test asks "whether the district the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts[.]" *Uffner v. La Reunion Francaise, S.A.*, 244 F.3d 38, 42 (1st Cir. 2001) (citations and internal quotation marks omitted). For the same reasons that the Bank's forum-based contacts pass the "relatedness" test for purposes of personal jurisdiction, they pass the "substantial part" test for purposes of venue.

IV. Conclusion

For the foregoing reasons, I recommend that the Motion be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 7th day of June, 2002.

_____
David M. Cohen

United States Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 02-CV-42

ROBINSON MANUFACTURI, et al v. BANC OF AMERICA COMM Filed: 02/26/02
Assigned to: JUDGE D. BROCK HORNBY Jury demand: Plaintiff
Demand: $1,400,000 Nature of Suit: 190
Lead Docket: None Jurisdiction: Diversity
Dkt# in other court: None

Cause: 28:1332 Diversity-Breach of Contract

ROBINSON MANUFACTURING COMPANY plaintiff	JEFFREY M. WHITE 773-6411 [COR LD NTC] PIERCE, ATWOOD ONE MONUMENT SQUARE PORTLAND, ME 04101-1110 791-1100
L W PACKARD & COMPANY INC plaintiff	JEFFREY M. WHITE (See above) [COR LD NTC]
v.	
BANC OF AMERICA COMMERCIAL LLC defendant	JEFFREY T. EDWARDS 775-5831 [COR LD NTC] RANDALL B. WEILL, ESQ. 775-5831 [COR] PRETI, FLAHERTY, BELIVEAU, PACHIOS & HALEY, LLC ONE CITY CENTER PO BOX 9546 PORTLAND, ME 04101-9546 791-3000